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Ameritech

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November 23, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Street Lobby – TW A325
Washington, D.C. 20554

Re: CCB/CPD 97-30 and CC Docket No. 96-98

Dear Ms. Salas:

Ameritech would like to elaborate on a legal argument made in its most recent *ex parte* in the above-referenced proceeding. Ameritech regrets having to file another *ex parte* but the issues now being considered were not previously briefed by the parties and are too important to neglect.

In its earlier *ex parte,* Ameritech argued that the Commission could not lawfully rule that there is a void in its rules regarding inter-carrier compensation for ISP traffic that states may fill by mandating reciprocal compensation. Its argument was two-fold. Ameritech argued, first, that there is no such void; the Commission already has implemented a policy that addresses compensation for carriers that are jointly providing access service to ISPs.[1] Ameritech argued, second, that, even if the Commission found (wrongly) that it has not adopted a policy governing compensation for jointly provided ISP traffic, states

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[1] Under this policy, which is a product of the ISP access charge exemption, each carrier must look to its respective customer(s) for compensation. This may not be an *inter-carrier* compensation scheme *per se,* but the FCC has never required inter-carrier compensation. All it has ever required is that two LECs jointly providing an access service share the revenues generated by that service. That is why some meet-point billing contracts do not require inter-carrier payments between the two LECs; they instead provide that each LEC will be separately paid its share of the revenues owed by the IXC.

In the typical access situation, some arrangement between the two LECs is necessary to ensure that both of them receive their share of the access revenues paid by the IXC. Without such an arrangement, one LEC might find itself completely uncompensated. In the case of ISP traffic, on the other hand, the Commission has already prescribed rules that dictate a sharing of the revenues generated by ISP access traffic: the ILEC collects revenues from the originating end user; the CLEC from the ISP. Ameritech has shown that the division of revenues is relatively equitable without reciprocal compensation, but that is beside the point: whether or not a policy is equitable has nothing to do with whether the policy exists.

could not possibly fill the "vacuum" with a requirement that is inconsistent with stated FCC policy. Ameritech now wishes to elaborate on this second argument.[2]

In the *Local Competition Order* (CC Docket No. 96-98), the Commission squarely held, in paragraphs 1033 and 1034, that reciprocal compensation requirements do not apply to interstate traffic. It has been suggested by some that this holding was vacated in *Iowa Utilities Board.* That suggestion is incorrect.

Paragraphs 1033 and 1034 were included in a section of the *Local Competition Order* entitled "Distinction Between 'Transport and Termination' and Access." These paragraphs thus were not only about reciprocal compensation, but *interstate access services* and the charges therefor. They invoked, not only section 251(b)(5), but also sections 201 and 251(g), the latter of which preserves the access charge rules and policies in place at the time of the 1996 Act, including those relating to compensation.

Ameritech would not dispute that portions of these paragraphs may have been implicitly vacated to the extent they mirror the substance of the vacated reciprocal compensation rules. But the reciprocal compensation rules that were vacated purported to address the application of reciprocal compensation, not to interstate traffic, but to *local* traffic. That is clear from the text of the vacated rules. *See* 47 CFR 51.701(a) ("The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers.")

It is one thing for the FCC to adopt rules regarding reciprocal compensation arrangements for local traffic. The 8th Circuit said the FCC could not do that. It is quite another, however, for the FCC to rule that reciprocal compensation arrangements do not apply to interstate traffic.[3] The FCC so ruled in paragraphs 1033 and 1034, and the court did not vacate this ruling. To the contrary, the court specifically recognized the FCC's continued authority to regulate interstate traffic.[4] Moreover, it has repeatedly reiterated

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[2] Ameritech also notes that inter-carrier compensation contracts dictate an equitable sharing of revenues. Reciprocal compensation arrangements for ISP traffic do not divide revenues, and they certainly are not equitable. Even if states have authority to fill any inter-carrier compensation "gap," they surely cannot do so in a manner that is unfaithful to existing inter-carrier compensation policies for access traffic.

[3] In paragraph 1033 of the Local Competition Order, the FCC recognized this distinction. It held: " Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252(d)(2), while access charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act. In paragraph 1034, the FCC also noted that section 251(g) preserved the access charge regime as it existed at the time of enactment. It held further: "We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport and termination of interstate ...traffic."

[4] The court held that interconnection, unbundled access, resale, and transport and termination of traffic "are fundamentally intrastate in character" because "[a]llowing competing telecommunications carriers to have direct access to an incumbent local exchange carrier's established network in order to enable the new carrier to provide competing general local telephone services is an intrastate activity even though the local network thus invaded is sometimes used to originate or complete interstate calls." *See* text accompanying n. 20. While the court thereby found the states to have jurisdiction over certain functions necessary to local competition, nothing in the decision remotely suggests any reduction of the

the FCC's continuing authority to address the application of interconnection requirements to interstate traffic. (*See CompTel* v. *FCC*, 117 F.3d 1068, upholding FCC rules addressing application of interstate access charges to unbundled elements).

Ameritech also argued that it would be unlawful for a state arbitrator to regulate interstate commerce, except as necessary to implement sections 251, 252, and FCC rules thereunder. Legal questions, aside, it would not make sense as a public policy matter for the Commission to sanction any such unauthorized actions.

If state arbitrators are permitted to address "voids" in interstate access policy, a whole new range of issues will be raised in interconnection negotiations. Parties will take full advantage of the benefits of forum shopping, all the more so if the FCC's view is that, in light of *Iowa Utilities Board*, the states are free to ignore anything the FCC once said about the application of most of section 251 to interstate services. Why should any carrier wait for the FCC to address so-called "gaps" in interstate access rules if it can first take a crack at a state arbitrator? If the arbitrator denies the request, it can always pursue the issue at the FCC.[5]

The proposal under consideration would thus be contrary to sensible public policy. Moreover, it would violate:

(a) section 252(c) (which limits state arbitrators to enforcing sections 251 and 252 and FCC rules thereunder);
(b) section 251(g) (which provides that FCC policies governing interstate access services remain in place until the FCC revokes them);
(c) the FCC's holding that reciprocal compensation does not apply to interstate services;
(d) the Administrative Procedure Act (which does not permit the FCC to delegate to state arbitrators the right to revoke this ruling or to establish new compensation policies for jointly provided ISP access service); and possibly
(e) the Commerce and Due Process Clauses of the United States Constitution.

It should not be adopted.

Sincerely,

Gary L. Phillips

Commission's exclusive authority to regulate interstate access services, which are different from those functions.

[5] This is not far-fetched. It is precisely what the CLECs did in this proceeding. They first raised the reciprocal compensation issue at the FCC and argued that the FCC had exclusive jurisdiction to decide the matter. *See* ALTS June 20, 1997 letter at 1. Nevertheless, they simultaneously pursued the issue with state regulators.